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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 372

THAYER COMPANY ET AL, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Thayer Company and H. N. Thayer Company pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the first Circuit, entered in the above case on July 1, 1954.

OPINION BELOW.

The opinion of the United States Court of Appeals for the First Circuit (JRA[1] 2895-2911), set forth in Appendix B hereto, is reported at 213 F.2d 748 and at 26 Labor Cases, Paragraph 68,457.

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[1] Joint Record Appendix and Proceedings are cited herein as JRA.

JURISDICTION.

The decree of the circuit court of appeals was entered on July 1, 1954 (JRA 2912). On June 21, 1954, an order of court was entered denying Respondents' petition for rehearing. The jurisdiction of this court is invoked under Section 1254 of Title 28, U.S. Code Annotated.

QUESTIONS PRESENTED.

1. Where strikers are refused reinstatement because they have committed coercive acts unprotected by Section (7) of the National Labor Relations Act, is it open to the Board nevertheless to determine that the discharge was not "for cause" under Section 10 (c) and order reinstatement with back pay because these acts were committed in the course of a strike precipitated by the employer's unfair labor practices.

The Board applied the rule that "discharge for cause" under Section 10 (c) has the same meaning and effect in an economic strike as in an unfair labor practice strike but found as a fact that none of the strikers was guilty of coercive and improper conduct. The Circuit Court of Appeals found on the record that certain strikers were guilty of coercive and unprotected acts but ruled as a matter of law that reinstatement could nevertheless be ordered in an unfair labor practice strike even though reinstatement could not be ordered on these same facts in an economic strike.

2. Whether in a proceeding before the National Labor Relations Board under Section 10 (c) of the act for reinstatement and back pay, any effect or weight, evidentiary or substantive, should be given to the findings and decree of the state court affirmed by the Supreme Judicial Court of the Commonwealth of Massachusetts enjoining the carrying on of the strike because of mass picketing and acts of violence found to have occurred in violation of state laws.

The Board ruled that state law was not applicable to

the proceeding and that neither the findings nor the decree of the state courts was entitled to any weight or consideration whatever. The Circuit Court of Appeals distinguished between an economic strike and a strike precipitated by unfair labor practices of the employer, holding that in the latter case the decision of the state courts was not entitled to any consideration or weight, although it might be in the former.

3. Whether the Circuit Court of Appeals could properly rule that the strike was not enjoinable by state law in the face of a decision of the highest court of the state enjoining the very strike.

4. Whether the Circuit Court of Appeals erred in affirming the administrative action of the Board in ordering reinstatement of strikers with back pay on grounds other and different from those invoked by the Board.

5. Whether the decision of the Circuit Court of Appeals that the strikers were entitled to reinstatement with back pay notwithstanding their participation in mass picketing was erroneous.

6. The propriety of the Board's practice in refusing to produce prior statements of its witnesses at the request of counsel for the employer for use in cross-examination, while allowing counsel for the Board to use such statements to cross-examine the employer's witnesses.

STATUTE AND REGULATION INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151, et. seq.) are set forth in Appendix A of this petition. The relevant provisions of Sec. 203.90 of Series 5 and Sec. 102.90 of Series 6, Board Rules and Regulations, 29 CFR 102.90, since renumbered 102.87 (17 F.R. 4983) are likewise set forth in Appendix A.

STATEMENT.

Under Section 10 (e) of the National Labor Relations Act, the Board petitioned the First Court of Appeals for enforcement of its order dated June 30, 1952 directing the Petitioners, Thayer Company and H. N. Thayer Company, corporations manufacturing baby carriages and strollers at Gardner, Massachusetts inter alia to reinstate with back pay one hundred and three of the Petitioners' employees who engaged in a prolonged strike found by the Board to have been precipitated by the Companys' unfair labor practices in discharging seventeen employees for union activities. The Petitioners at the conclusion of the strike refused to reinstate the one hundred and three employees on the ground that they had forfeited their right to reinstatement because of their participation in improper conduct in the course of the strike. The improper conduct alleged consisted of two types: a. Individual incidents of violence, coercion, threats and intimidation against non strikers (JRA 2489-2523, 2579-2580). b. Participation in mass picketing before the entrances of the Petitioners' plants (JRA 2461).

1. ***Reinstatement Rights of Strikers Guilty of Coercive Unprotected Activity.***

Both the Petitioners and Counsel for the Board in the proceedings before the Trial Examiner, the Board and Circuit Court of Appeals tried and argued the case on the basis that the strikers were not eligible for reinstatement if their collective action was not protected by Section 7 of the Act (JRA 2901, 2904). The Trial Examiner and the Board acted on this basis but found that the conduct of the strikers was so protected. The Circuit Court on the same facts held the mass picketers were entitled to reinstatement but ruled that the conduct of certain individuals was coercive and unprotected by Section 7 (JRA 2914-2915). As

to these, the cause was remanded to the Board to decide whether under the circumstances there was cause for the failure to rehire, and if not whether reinstatement would effectuate the policies of the Act (JRA 2908, 2914-2915). The Circuit Court ruled that because the strike was one caused by the employer's unfair labor practices, the Board possessed independent authority under Section 10 (c) to order reinstatement of those who engaged in non-section 7 activities although it could not do so in an economic strike (JRA 2901).

2. *State Court Findings*

During the course of the strike, the Petitioners filed suits in the Superior Court of the Commonwealth of Massachusetts and obtained an injunction against the strike and an order prohibiting all picketing based upon findings that the strike had been characterized by repeated acts of violence and mass picketing. (JRA 2754-2755, 2782-2783). This injunction was upheld by the Massachusetts Supreme Court which adopted the findings of the trial judge:

> " . . . that repeated acts of violence had taken place on the public ways in the vicinity of the plants of the plaintiffs, that mass picketing had occurred involving at times more than two hundred pickets at one plant and sixty-five pickets at the other plant; that persons including employees and those with whom the plaintiffs had contractual obligations were seriously interfered with or actually prevented from entering or leaving the plants; that vile and obscene names were directed to men and women entering or leaving the plants; that threats of violence and other unlawful acts had been made to non strikers and their families at their homes, on the public ways, and at their places of business; that private property of non-strikers had been damaged in an effort to intimidate them to join the strikers; that

these acts been committed by the defendants named in the bill and by persons acting in concert with them; that the police were unable to prevent such acts; and that such acts would continue unless enjoined." (JRA 2789-2790)

At the hearing before the Trial Examiner, Counsel for the Petitioners offered in evidence a full certified record of the proceedings in the Superior and Supreme Courts of Massachusetts. Over the objections of the Petitioners' counsel, the Trial Examiner restricted the admission of the record of the state court proceedings purely to establishing that complaints were filed by the Petitioners and that on certain dates injunctions were issued and upheld by the Massachusetts Supreme Court (JRA 141-152, 180-181, 2334-2335), Petitioners' counsel having saved an exception to any limitation. The transcript was offered for four purposes: 1. To give a complete picture of the matter. 2. As evidence on the issue whether the strikes were legally conducted. 3. On the question of estoppel by judgment or res judicata against the individual charging parties in the case before the Board. 4. On the question whether the conduct of the strikers was such as to bar their right to reinstatement.

In his intermediate report, the Trial Examiner ruled that the findings and decision by the Massachusetts courts were irrelevant in deciding the issues before the Board, which issues included reinstatement for striking employees (JRA 2484-2487). The National Labor Relations Board affirmed this ruling: "This Federal Board is in no respect bound by the decisions of the Courts of Massachusetts . . . as to . . . the legality of the manner in which the strike was conducted." (JRA 2572-2574). The First Circuit Court of Appeals in its opinion of June 3, 1954 upheld the Board's order of reinstatement with back pay of the mass

picketers, stating that where, as in the instant case, the strike was caused by an unfair labor practice of the employer, the Board has power under Section 10 (c) to order reinstatement to effectuate the purposes of the Act even if strikers by their conduct have forfeited the protection of Section 7 of the National Labor Relations Act so that the strike does not constitute a protected concerted activity (JRA 2901). The Court stated it was therefore unnecessary to decide whether the Board was bound by the findings in the state injunction proceeding, although intimating that such a holding might perhaps be justified in the public interest (JRA 2903, 2904-2905).

3. *Findings of Trial Examiner, Board and Circuit Court as to Mass Picketing.*

According to the findings of the Trial Examiner (JRA 2475-2482), adopted by the Board (JRA 2566, 2575) and in turn by the First Circuit Court of Appeals (JRA 2898), the picketing at Plant 1, operated by the Thayer Company, was intensive. As many as one hundred and sixty pickets marched in a continuous double line at arms-length distance apart in front of the entrances. The picketing was likewise intensive at the smaller Plant 2, operated by the H. N. Thayer Company (JRA 2471-2475). As many as sixty pickets marched in front of the entrances in the same manner as outlined for Plant 1.

a. *Picketing at Plant 1.* During the strike the number of pickets along the front of the plant varied from twenty to eighty and increased to as many as one hundred and sixty (JRA 2477). The number of pickets regularly increased at the hours when the non-strikers were entering or leaving the plant, and decreased during the hours between (JRA 2481-2482). At the outset of the strike, from six to eight policemen were on duty at the plant entrances

in the morning. This number was increased to twelve to fourteen when the picketing became more intensive (JRA 2480-2482). On these occasions, eight policemen would station themselves four on either side of the driveway leading into the plant parking area. Before the police arrived, the pickets were marching in a continuous elongated double line at arms-length apart along the frontage of the plant (JRA 2480-2481). As cars approached, the pickets congregated in front of the driveway (JRA 2475). The police then stepped in and broke up the picket line. The pickets responded "fairly well" (JRA 2479). On occasion, the policemen were pushed forward by surging pickets in the rear (JRA 2477-2478). At the beginning of the strike, pickets pushed against the front of an entering car. A policeman instructed the driver to run them down, and the pickets got out of the way (JRA 2478-2479). After the driveway was opened up, the cars of the non-striking employees would enter in a convoy: " . . . sometime after the strike started, the employees who drove to work began to arrive simultaneously. The cars gathered at the Gardner Police Station and waited for the police cruiser, containing police who were on duty at the plant, to depart. After a few minutes, giving the police time to station themselves at their places of duty, the cars carrying the workers would leave together for the plant." (JRA 2476). On three occasions, police found nails in the driveway going into the plant (JRA 2478). On one occasion, a car was struck by a stone thrown from the direction of the strikers (JRA 2479). The picketing was accompanied by swearing and name-calling such as "scab", "bastard" and "rat", as well as by the singing of ribald songs (JRA 2476, 2478-2479, 2481) and obscene language and gestures (JRA 2505). Silverman, an official of the International office of the striking local union, cursed and shoved a non-striker who was trying to cross the picket line. The Trial Examiner and the Board

found that this constituted restraint and coercion by a union agent (JRA 2509).

b. *Picketing at Plant 2.* The number of pickets varied between twenty-five and sixty during the morning and evening hours. The number was largest at the morning, noon and afternoon hours when the non-striking employees were entering and leaving the plant, and dropped off to six to eight in between (JRA 2472). As at Plant 1, it was the custom of the police to drive to the plant in a police cruiser before the employees were due to report. Four officers would station themselves, two at each side of the driveway into the plant, and break up the picket line so that cars might enter (JRA 2472-2473). The number of pickets at the mouth of each driveway when this took place ranged from ten to fifteen up to thirty. Pickets on occasion attempted to get in front of cars entering the driveway, but uniformly desisted when ordered by the police to stop (JRA 2474). Cars did not leave until an officer at the mouth of the driveway gave a signal, after which the cars left together, as at Plant 1 (JRA 2474). Silverman, an official of the International Union of the local conducting the strike, assaulted a non-striking employee on the picket line and was convicted and fined therefor (JRA 2474). Pickets ran beside cars turning into the driveway and pounded on the windows (JRA 2474, 2516). Seventeen or eighteen pickets attacked a non-striking employee in front of the plant as he left work (JRA 2508-2509). The First Circuit Court of Appeals found this incident to be coercive in nature and calculated to instil fear of physical harm (JRA 2908). Roofing nails and tacks in goodly amounts were found in the driveway, as at Plant 1 (JRA 2473).

Conclusions. The Trial Examiner concluded that the strikers at the two plants did not demonstrate a fixed determination to bar ingress to the plants: " . . . Many

cars and persons entered and left the plant without incident despite the presence of the pickets . . . " (JRA 2483). Union Agent Binnall instructed the strikers not to prevent non-strikers from entering or leaving the plants. The National Labor Relations Board adopted the Trial Examiner's findings and conclusions with respect to the nature of the picketing (JRA 2566, 2575-2576). The First Circuit Court of Appeals in an opinion dated June 3, 1954 found "The picket lines were fairly well behaved, and non-striking employees were able to enter and leave the plants without serious incident. Police were present throughout the strike, and while it was often necessary for them to step in front of the pickets in order to open up the driveways leading to the plants, these police activities met with only very minor resistance on the part of the pickets." (JRA 2898).

4. *Prior Statements of Board Witnesses*

During cross-examination before the Trial Examiner of Edgar Arsenault, a key witness for the Board, Salny, Counsel for the Petitioners adduced the fact that Arsenault had given signed statements a year or more earlier, one to Ramsey, Counsel for the Board, (JRA 377) and another to Raymond Smith and a Mr. Davis, agents of the Board (JRA 391-392). Thereupon Salny demanded that Ramsey produce the statement, stating "I want to cross-examine this witness to demonstrate that the statement he gave one year ago and his evidence that he gave today are not the same", (JRA 377-378). Ramsey refused to produce the statement (JRA 378). Thereupon the Trial Examiner ruled that under Section 203.90 of the Board's Rules and Regulations (Appendix A) an attorney for the Board may not produce such affidavits without written consent of the Board or General Counsel, (JRA 378-379). Pursuant to Salny's

request, the Trial Examiner issued a subpoena *duces tecum* addressed to Ramsey directing him to appear with the signed statement (JRA 382), whereupon Ramsey made a motion to revoke the subpoena. The Trial Examiner granted the motion to quash or revoke the subpoena, (JRA 387, 390) stating that he had not passed upon the request on the basis of Massachusetts law, but had relied solely upon the Board Rules and Regulations, (JRA 391). Salny then wrote to the General Counsel for the Board requesting that he authorize Ramsey to produce Arsenault's statement so that he might use it in cross-examination to demonstrate that the evidence Arsenault had given on direct examination was inconsistent with said statement as Salny had good reason to believe was a fact. He also requested that the General Counsel issue a general authorization to Ramsey to make available to him at the appropriate time during the hearing prior statements of other Board witnesses, (JRA 2819-2820). Relying upon a claimed privilege against disclosing allegedly confidential governmental data, the General Counsel refused as to all Board witnesses including Arsenault, (JRA 2821-2822), without a prima facie showing that the statements were inconsistent with the witnesses' testimony. Petitioners' counsel reported this refusal to the Trial Examiner (JRA 408).

Subsequently after the issuance of the Trial Examiner's Intermediate Report, the Petitioners filed a Motion to Reopen Record and Adduce Additional Testimony, (JRA 2824-2852). In his supporting affidavit (JRA 2835-2849), Salny said that he did not renew his demand for statements of each subsequent Board witness because the Trial Examiner's ruling with reference to Arsenault was based solely upon the Board rule and the General Counsel's refusal was not confined to the statement of Arsenault (JRA 2848-2849). This motion was denied by the Board relying solely upon the Board rule prohibiting an unauthor-

ized disclosure by Board employees of Board records, (JRA 2563-2566).

The Trial Examiner admitted in evidence statements taken by Board agents when offered by counsel for the Board to impeach Petitioners' witnesses, (JRA 1877-1880, JRA 1952-1953).

The Circuit Court of Appeals upheld the refusal to make the statements available for use in cross-examination (JRA 2908-2911). In so doing, it disregarded the Board's regulation and acted on the basis that the statements need not be produced without a prima facie showing that they were of contradictory or impeaching character (JRA 2911).

REASONS FOR ALLOWING WRIT.

1. Certain strikers participated in incidents which the Circuit Court found to be coercive and calculated to instil fear of physial harm in the non-striking victims and therefore not to be activities protected under Section 7 (JRA 2908). As to these strikers, the circuit court remanded the case to the Board to decide whether under these circumstances there was cause for the refusal to rehire, and if not whether reinstatement would effectuate the policies of the Act. Obviously, it would exceed the Board's discretion to order reinstatement in these instances. *NLRB* v. *Fansteel Corp.*, 306 U.S. 240; *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 50

As to the remaining strikers seeking reinstatement, the Circuit Court avoided deciding whether or not the findings in the state injunction proceedings were binding on the Board on the question whether the strike was a protected concerted activity under Section 7 of the National Labor Relations Act by holding that the Board has independent authority under Section 10 (c) of the Act to order reinstatement of strikers who have forfeited that protection of Section 7 by their improper conduct in carrying on a

strike precipitated by their employer's unfair labor practice, as here, although forfeiture of that protection would have barred reinstatement rights in an economic strike (JRA 2900-2905). The sole authorities mentioned for this rather startling view were *NLRB* v. *Elkland Leather Co., Inc.* 114 F.2d 221 (CA 3, 1940) cert. den. 311 U.S. 705 (1940) which is not based on this distinction and a footnote to a law review article by Professor Cox of Harvard Law School in 26 Ind. L. J. 319 at 324, note 24 (JRA 2901). This holding by the First Circuit Court of Appeals is in conflict with the decisions of this Court, and the other Circuit Courts of Appeal. It upsets the rule followed by the Board itself.

In the first place, it was manifestly unfair to decide the case on the basis of a "subtlety" which was neither the basis of the Board's decision nor dreamed of by either side (JRA 2901, 2904). See Section 10 (e) of the Act. Moreover, it is a fundamental rule of administrative law that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. *S. E. C.* v. *Chenery Corp.*, 332 U.S. 194, 196; 318 U.S. 80. Accordingly, if the Circuit Court was correct in its holding on this point, it should have grasped the nettle firmly and decided whether or not the state court findings were binding on the Board and resulted in depriving strikers of the protection of Section 7. If it decided that they were so binding, under its own logic, it should have remanded to the Board the ques-

tion whether their reinstatement under Section 10 (c) would nevertheless effectuate the purposes of the Act.

In the second place, the House Conference Report on the Labor Management Relations Act of 1947 made it abundantly clear that the Taft-Hartley amendments made it impossible for the Board to order reinstatement of employees who had engaged in unlawful or other improper conduct unprotected by Section 7 of the National Labor Relations Act: "This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have *any* protection *under the Act*, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible." (emphasis supplied) H. R. #510, 80th Cong. First Sess., U.S. Code, Cong. Serv. p. 1145. As this Report also pointed out, this rule had become firmly established by the Courts and the Board even before the 1947 amendments. A careful scrutiny of cases involving reinstatement rights of strikers who engaged in improper conduct in the course of strikes provoked by the employer's unfair labor practices fails to support the validity of the distinction drawn by the First Circuit Court. *NLRB* v. *Fansteel Corp.* 306 U.S. 240; *Southern Steamship Co.* v. *NLRB* 316 U.S. 31; *NLRB* v. *Clinchfield Coal Co.*, 145 F.2d 66, 72, 73 (CA 4, 1944); *NLRB* v. *Longview Furniture Co.*, 206 F.2d 274; *W. T. Rawleigh Co.* v. *NLRB* 190 F.2d 832 (CA 7, 1951); *NLRB* v. *Mt. Clemens Pottery Co.* 147 F.2d 262 (CA 6, 1945); *NLRB* v. *Clearfield Cheese Company, Inc.* (May 7, 1954, CA 3) 213 F.2d 70, 75; *NLRB* v. *Cambria Clay Products Co.* (CA 6, July, 1954) 26 Labor Cases, Par. 68,540. In the leading case, *NLRB* v. *Fansteel Corp.*, 306 U.S. 240, Chief Justice Hughes speaking for this court repeatedly stated that unlawful conduct of strikers barred reinstatement, id. pp. 254-258. He considered the sit-down

strikers as being "outside the protection *of the statute*", not merely of Section 7, (emphasis supplied) id., pp. 256-257. (The only authority the Petitioners have been able to find on this point favorable to the First Circuit's view is the dissenting opinion of Mr. Justice Reed in the *Fansteel* case at p. 265.) The Supreme Court has never retracted its position. Thus, Mr. Justice Reed, in his dissenting opinion in *Southern Steamship Company* v. *Labor Board*, 316 U.S. 31, 50 states the opinion of the majority to be: "Where the strike provoked by the unfair practices is itself unlawful, the Board, regardless of the circumstances, loses its power to reinstate after discharge."

" 'Concerted activities' by employees and dismissal 'for cause' by employers are not dissociated legal criteria under the Act. They are like the two halves of a pair of shears", Frankfurter J., dissenting opinion in *NLRB* v. *Local Union No. 1229*, 346 U.S. 464, 480. The majority opinion of this Court in the *Local Union No. 1229* case also ignored the alleged distinction as to reinstatement rights of strikers who engage in unprotected activities depending upon whether the strike is an economic one or one provoked by the employer's unfair labor practice, although the Court cited Cox's article and was therefore aware of the supposed distinction, Id., 477-478, footnote 13.

In both the *Fansteel* case, *supra*, at page 258, and in the case of *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 at page 48, the theory that two wrongs may make a right, which by inference underlies the "balancing" theory set forth in the First Circuit Court's opinion in this case (JRA 2905, 2907) as proper in unfair labor practice strike cases where the employees also engaged in misconduct, was denounced: "It should be stressed that the view we have taken does not prevent the redress of grievances under the act, by seeking the assistance of the courts in forcing

petitioner to bargain, or by *legitimate* striking, picketing, etc." (emphasis supplied)

The early theory of the Board and of the Third Circuit in ordering reinstatement in cases of minor acts of illegality or violence (including *NLRB* v. *Elkland Leather Co.*, 114 F.2d 221, 225,) was not based on the distinction drawn by the First Circuit Court, but rather on the theory that the minor acts constituted protected concerted activities under Section 7: "Violence of this nature however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Section 13 of the Act, 29 U.S.C.A., Section 163, that nothing therein should be construed so as to interfere with, impede or diminish in any way the right to strike." *Republic Steel Corp.* v. *NLRB*, 107 F.2d 472, 479. This theory that the end justifies the means in labor disputes has long since been repudiated by the courts, by the House conference Report, and evidently by the Third Circuit. See *NLRB* v. *Clearfield Cheese Co.*, (CA 3, May 7, 1954) 213 F.2d 70, 75. See also the quotation from Senate Report #105, 80th Cong. 1st Sess. 50, by this Court in *United Construction Workers* v. *Laburnum Construction Corp.* (June 7, 1954), 347 U.S. 656, 668, in which, referring to mass picketing and other violence, the Report stated: "*Some of these acts are illegal under State Law, but we see no reason why they should not also . . . at least deprive the violators of any protection furnished by the Wagner Act.*" (Italics by the Court)

2. As stated in this petition (pp. 5-7), the Trial Examiner and the National Labor Relations Board were upheld by the Circuit Court of Appeals in their refusal to admit in evidence generally and give effect to the findings of the Massachusetts court that the strike was conducted with repeated acts of violence and mass picketing. This

decision of the First Circuit is contrary to the decisions of this Court, the decisions of the various Circuit Courts of Appeal and the practice of the Board itself.

This Court authoritatively decided that a state court retains jurisdiction, both in economic strikes and in strikes provoked by the employer's unfair labor practices over cases "of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways' *Allen Bradley Local* v. *Wisconsin Board*, 315 U.S. 740, 749." *Garner* v. *Teamsters Union*, 346 U.S. 485, 488. State jurisdiction in this field is identical regardless of the nature of the strike *United Mineral & Chemical Corporation* v. *Katz* 118 F. Supp. 433, (U.S.D.C. E.D. N.Y.).

The Federal and State functions should be interpreted so as to synchronize and not clash. This was recognized in the Thayer opinion of the First Circuit so far as economic strikes are concerned (JRA 2901-2903).[2] However, the

[2] "Turning to point (1), perhaps we may infer from the *Briggs-Stratton* case that it would be violative of the supremacy clause of the Constitution for a state court to enjoin employee activity protected under Section 7. If that inference is correct, there is some merit to this aspect of the respondents' argument, for the Supreme Court has held that the States are free, at least to some extent, to regulate the means or methods by which a strike is conducted. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); see *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 488 (1953). Putting *Allen-Bradley* together with *Briggs-Stratton*, it would follow that when a state tribunal enjoins a strike because the strike as conducted constitutes an illegal breach of the peace, the state court's determination is tantamount to a finding that the employees by their conduct have lost the protection of Section 7 of the National Labor Relations Act. . . .

"Be that as it may, if it were true that the Board has power to order reinstatement only after finding that the strike and the picketing are protected under Section 7, a holding that the Board is bound by the findings in the state injunction proceeding might perhaps be justified

opinion evades a decision as to the effect of the State Court findings by stating that whether the strike was a concerted activity within Section 7 of the National Labor Relations Act is not "necessarily", "ipso facto" decisive of reinstatement rights where the strike is one caused by the employer's unfair labor practice (JRA 2901, 2902, 2904), as contrasted with an economic strike (JRA 2900). The fallaciousness of this view has already been argued herein (pp. 12-16). Moreover, even if the unprotected nature of strike activity is not "necessarily" or "ipso facto" decisive on the issue of reinstatement, it is not irrelevant or unimportant. Quite obviously, whether employees have engaged in unprotected improper conduct is of vital concern in deciding whether employees were discharged for cause or whether reinstatement will carry out the purposes of the Act under Section 10 (c).

The opinion below in the instant case puts the Circuit Court in the embarrassing position of ruling (JRA 2906) that the strike was not enjoinable under Massachusetts law in the face of a decision by the highest court of the state enjoining that very strike: " 'What is before us . . . is not the order as an isolated self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it.' *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin E.R B.*, 315 U.S. 437, 441", *Teamsters Union* v. *Hanke* 339 U.S. 470, 480.

The National Labor Relations Board normally accepts

(this we do not have to decide), for it might be suggested that the public interest would hardly be benefited by relitigating in the Board proceedings the precise question which was determined in the state tribunal, and which might have been brought before the Supreme Court of the United States for review on certiorari. Giving effect to the state determination, on the other hand, has the possible advantage of allowing the participants to act in reliance upon the earlier decision and might facilitate the re-establishment of labor stability in the disrupted plant. See Developments in the Law — Res Judicata, 65 Harv. L. Rev. 818 at 871 (1952)." (JRA 2902-2903)

the decision of a state court that unlawful acts have been committed, and where there is such a decision normally refuses to make an independent investigation of such facts. *NLRB* v. *Fansteel Corp.* 306 U.S. 240 (1939); *Republic Steel Corp.* v. *NLRB.*, 107 F.2d 472, 480; *Standard Lime & Stone Co.* v. *NLRB*, 97 F.2d 531 (CA 4, 1938) *NLRB* v. *Mt. Clemens Pottery Co.*, 147 F.2d 262 (CA 6, 1945); *W. T. Rawleigh Co.* v. *NLRB*, 190 F.2d 832 (CA 7, 1951); *U. S. Steel Co.* v. *NLRB*, 196 F.2d 459 (CA 7, 1952); *Wilson & Co.* v. *NLRB*, 120 F.2d 913 (CA 7, 1941). In most instances, the Board denies reinstatement to those employees who have been found by a state court to have violated state law in the course of the strike. In the cases just cited, the Board ordered reinstatement of some or all of the affected employees because, although it accepted the facts and conclusions of the state court as to illegality, it felt that the conduct was not sufficiently serious to warrant denial of reinstatement. However, in each case, the circuit court refused to enforce the Board order. In all of the circuit Court cases we have been able to find in which there had been state court decisions that illegal acts occurred in the course of a strike, both the Board and the Court accepted the state court findings. Occasionally, the Board has nevertheless tried to enforce reinstatement of affected strikers, but enforcement has been refused in all except obsolete cases decided by the Third Circuit Court of Appeals long before the 1947 amendments to the National Labor Relations Act, *Berkshire Knitting Mills* v. *NLRB*, 139 F.2d 134; *Republic Steel Corp.* v. *NLRB* 107 F.2d 472, 479-480; *NLRB* v. *Elkland Leather Co.*, 114 F.2d 221, 225, and in the case of *Kansas Milling Co.* v. *NLRB*, 185 F.2d 413, 420 (CA 10) which relied on the *Berkshire* doctrine.

The legislative history of the Labor Management Relations Act, as set forth in footnote 15 to Mr. Justice Jackson's opinion in *International Union* v. *Wisconsin Employment*

Relations Board (*Briggs-Stratton* case) 336 U.S. 245, 260-263, makes it clear that the Board is not justified under the amended act in ordering or refusing to order reinstatement based on its views of the importance or unimportance of unlawful concerted activities found by a state court to violate the state's public policy. This footnote consists of a lengthy quotation from the House Conference Report on the Labor Management Relations Act. See also *NLRB* v. *Kelco Corp.* (CA 4) 178 F.2d 578.

Both before and after the Thayer case, the Board has invariably accepted the state court findings as some evidence on the question whether acts of violence, coercion or trespass have been committed bearing on the right of reinstatement. See *Nashville Corp. and Avco Mfg. Corp.* 94 NLRB #223. But for the Thayer case, the Circuit Courts of Appeal have uniformly accepted the state court findings as evidence of probative value on this point and in fact have considered them as conclusive on the facts and on the illegality of the conduct.

3. The character of the picketing during the strike was such as to bar all of the affected employees from reinstatement, first, because it rendered the strike illegal and second, because practically all of the claimants participated in the picketing, (JRA 2461). Those who did not were "clearly on a plane with those who engaged in the actual picketing . . . " (JRA 2461). Clearly, the picketing at both plants constituted mass picketing, involving as many as one hundred and sixty pickets marching in a continuous double line at arms-length distance apart in front of the entrances at one plant and as many as sixty marching in similar fashion at the other. The facts are set forth in this petition (pp. 7-9). Section 12 (a) of the House Bill to amend the National Labor Relations Act in 1947 defined the term "unlawful concerted activity" to include in addition to the

prevention of ingress or egress by force, violence, physical obstruction or threats thereof "picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business (H.R. 3020, 80th Cong. First Sess., in Legislative History of the Labor Management Relations Act 1947, Gov't Printing Office 1948, pp. 204-205). This provision was eliminated in the conference for the reason shown in the legislative history of the Labor Management Relations Act, as set forth in footnote 15 to Mr. Justice Jackson's opinion in *International Union* v. *Wisconsin Employment Relations Board* (*Briggs-Stratton case*) 336 U.S. 245, 260-263:

> "More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*National Labor Relations Board* v. *Indiana Desk Co.* 149 F.2d 987 (1945); CCA 7th) . . .
> "By reason of the foregoing, it was believed that the specific provisions in the House Bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of Section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specfically mentioned subject to the protection of the Act." H.R. #510 80th Cong. 1st Sess. p. 38 under the rubric "Rights of Employees".

From the legislative history it seems clear therefore that the picketing in the Thayer case which obviously was "in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business", was an unlawful concerted activity.

As the United States Supreme Court stated on another occasion of less intensive picketing:

> "The numbers of the pickets in the groups constituted intimidation . . . The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful. When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and cannot be peaceable. . . . " *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 205.

See also *Cory Corp.* 84 NLRB 972, 975-979.

4. Prejudicial error was committed in the course of a Board hearing of charges of unfair labor practices against the Petitioners by denying them access to signed statements of Board witnesses for use in cross-examination. In a case brought by the Board itself, the attorney for the Board without seeking any special permission from the General Counsel, used at his discretion whatever statements he believed would serve his purpose to impeach and contradict witnesses, but hid behind a rule of the Board prohibiting production of documents by subordinates (Appendix A) when he in turn was asked to produce statements for use by Petitioners' counsel in impeaching and contradicting Board witnesses who had already taken the stand. The General Counsel refused to produce the documents without prior proof that in fact they were contradictory or impeach-

ing. He did not examine the statements himself to see if they were, but told the adversary to prove in effect that the documents once produced would be admissible, although he could not prove this until he had seen them. His attitude was cynical and disingenuous and boiled down to this: You can't prove until you have seen, and you can't see until you have proved.

Under Section 7 (c) of the Administrative Procedure Act (Ch. 324, 70th Cong. 2d Sess., 60 Stat. 237, as amended), every party has the right to conduct such cross-examination as may be required for a full and true disclosure of the facts. *Reilly* v. *Pinkus* 338 U.S. 269 (1949); *F.T.C.* v. *Carter Products Inc.* 346 U.S. 327 (1953); *Southern Stevedoring Co.* v. *Voris* (CA 5, 1951) 190 F.2d 275; *Kwasizur* v. *Cardillo* (CA 3, 1949) 175 F.2d 235, 237. Concerning the mass picketing the Trial Examiner stated:

> "Initially it should be noted that a host of witnesses gave testimony concerning the pattern and nature of picketing at both plants. These descriptions of the approximately seven-week long strike ranged from a portrayal of a polite tea party or social gathering . . . to a picture of a veritable Donny Brook. . . . " (JRA 2470)

Where credibility is of such vital significance, the error of the Circuit Court in upholding the refusal to produce the Statements goes to the heart of the case. Petitioners' counsel thus lost the opportunity to test these witnesses as to matters of recollection, of prejudice or bias and of truthful statements. *Alford* v. *U. S.*, 282 U.S. 687, 692.

As Petitioners' counsel pointed out to the Trial Examiner either side is entitled under the rules of evidence followed by the courts of Massachusetts, the jurisdiction in which the hearing was held, to insist upon production of any and all

written statements in the possession of counsel for the other side which were given by witnesses who have taken the stand, for the purposes of impeachment and contradiction of those witnesses on cross-examination. Such statements must be produced on demand without the necessity for any prior showing that they will in fact have any impeaching or contradictory value, *Gould* v. *Norfolk Lead Co.*, 9 Cush. 338, 347. They must be produced even for pre-trial examination, *Brewer* v. *Hassett* (D. C. Mass. 1942) 2 F.R.D. 222, 5 Fed. Rules Serv. 26 (b) 31, Case 8. See also *U. S.* v. *Centracchio*, Crim. No. 52-47 (D.C. Mass. October 23, 1953) in which Judge Sweeney denied without opinion a motion to quash a subpoena *duces tecum* demanding production of all documents in the possession of the United States Attorney relative to investigation of the defendant's tax deficiencies. Any such papers produced at the request of one side and inspected by that side become admissible in evidence for th party producing them, *Leonard* v. *Taylor* 315 Mass. 580 (1944). Under Rule 43 (a) of the Federal Rules of Civil Procedure, Title 28, U.S.C.A., this Massachusetts practice is of course controlling in all cases between private litigants in the Federal Courts and therefore in all proceedings before the National Labor Relations Board, (See Section 10 (b) of the Act) unless the Board is entitled to some peculiar privilege over private plaintiffs because it is a government agency. The Board has claimed such a privilege under the Board's rule prohibiting Board employees from producing records or testifying without written consent. (Appendix A). This regulation was issued pursuant to R. S. Section 161, 5 U.S.C. Section 22, which reads as follows:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its

officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

This Court has ruled that the statute and the implementing regulations validly take away from subordinate officials the authority to produce records or to testify without the consent of the head of the agency in a suit in which the Federal Government is not a plaintiff, but that they do not create any privilege in the head of the agency to refuse to produce the documents in a suit brought by the Federal Government, *Boske* v. *Comingore*, 177 U.S. 459 (1900); *U. S. ex rel Touhy* v. *Ragan*, 340 U.S. 462 (1951). Moreover it is the duty of the Court and not the administrative agency to determine whether the information sought is privileged. *U. S.* v. *Reynolds*, 345 U.S. 1 (1953); *U. S.* v. *Krulewitch*, 145 F.2d 76; *U. S.* v. *Andolschek*, 142 F.2d 503 (CA2); *U. S.* v. *Beekman*, 155 F.2d 580 (CA 2, 1946); *U. S.* v. *Cotton Valley Operators Committee*, 339 U.S. 940; *U. S. ex rel Touhy* v. *Ragan*, 340 U.S. 462, 472 (1951); *Durkin* v. *Pet Milk Co.*, 23 Labor Cases Par. 67,678, 18 Fed. Rules Serv. 34.42, Case 4 (W. D. Ark. June 17, 1953). Any claim of privilege based upon the public interest in the privacy of the documents was waived by the filing of the complaint by the National Labor Relations Board. *Fleming* v. *Bernardi*, 1 F.R.D. 624, 625 (N.D. Ohio); *Brewer* v. *Hassett*, 2 F.R.D. 222 (D Mass.); *U. S.* v. *Andolschek*, 142 F.2d 503 (CA 2); *Gordon* v. *U. S.*, 344 U.S. 414 (Feb. 2, 1953); See also *U. S.* v. *Cotton Valley Operators Committee*, 339 U.S. 940, 13 Fed. Rules. Serv. 34.42, Case 2, 9 F.R.D. 719; *Bowman Dairy Co.* v. *U. S.* 341 U.S. 214 (1951); *U. S.* v. *Coplon* 185 F.2d 629 (CA 2, 1950) cert. den. 342 U.S. 620; *Durkin* v. *Pet Milk Co.*, 23 Labor Cases, Par. 67,678, 18 Fed. Rules Serv. 34.42, Case 4.

Any privilege attached to the statements as statements

of confidential informants was waived when the General Counsel used the informants as witnesses. *Scher* v. *U. S.* 305 U.S. 251, 254; *U. S.* v. *Krulewitch* 145 F.2d 76 (CA 2); *Gordon* v. *U. S.*, 344 U.S. 414, 419; *Durkin* v. *Pet Milk Co.*, supra; *U. S.* v. *Kelsey-Hayes Wheel Co.* (U.S.D.C.E. Mich., April 16, 1954) 22 L. W. 2503, 19 Fed. Rules Serv. 34.411, Case 9, p. 34.411-15.

The statements are not protected from production under the rule in *Hickman* v. *Taylor*, 329 U.S. 495, holding that the work product of attorneys in preparation for trial is conditionally privileged from discovery before trial. The *Hickman* case applied to pre-trial discovery. Here we are dealing with a request at the time of the trial limited to prior statements of Board witnesses who actually have taken the stand. The cloak of confidence having been lifted voluntarily, the privilege no longer applies, *U. S.* v. *Kelsey-Hayes Wheel Co.*, supra. Even if *Hickman* v. *Taylor* applied, that case holds at page 511 that discovery of statements may be properly had if they are useful for purposes of impeachment or corroboration.

NLRB v. *Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289 (CA 2 1950) and *NLRB* v. *Jamestown Sterling Corp.*, 211 F.2d 725 (CA 2 1954) are adverse precedents. They are distinguishable however. In the *Quest-Shon Mark* case, company counsel did not demand the statements for use in cross-examination. It appears that he regarded the statements themselves as direct affirmative evidence having substantive or independent testimonial value. Moreover, the Trial Examiner granted a motion to quash subpoenas seeking the pre-trial statements on the merits, and not as in the case at bar, in reliance solely upon the Board regulation. In the *Jamestown Sterling* case, "There was no effort by respondent to obtain the written consent of the . . . General Counsel . . . ", unlike the Thayer case. Moreover, the element of unfairness present in the Thayer case was not present. In the *Jamestown* case,

"No such affidavit was used by the General Counsel in examining Paterneti or any other witness . . . "; whereas in the Thayer case, the Board counsel utilized and put in evidence such of the statements as would serve his purpose to impeach and contradict petitioners' witnesses while hiding behind the Board rule when he in turn was asked to produce statements for impeachment and contradiction of Board witnesses. In the *Jamestown* case, only one witness was involved whose evidence was not relied upon by the Trial Examiner or the Board (Board Brief p. 27), whereas in the Thayer case, at least one hundred and seventy-five statements were involved of witnesses whose testimony went to the heart of the case. A scrutiny of the records and the briefs in the *Quest-Shon Mark* and *Jamestown* cases discloses that the question was given only summary and cursory treatment. For instance, the Respondent company's brief in the *Jamestown* case devoted only two pages to the point with no cases cited.

The First Circuit Court of Appeals in the Thayer case disregarded altogether the Board's regulation and ruled albeit we believe erroneously, that the Petitioners were not entitled on the merits to secure the statements, (JRA 2911). The Trial Examiner on the other hand quashed the subpoena *duces tecum* solely on the basis of the claimed privilege and explicitly refused to pass upon the merits of the question, (JRA 391). His action was subsequently upheld by the Board (JRA 2563-2566). As the Petitioners strongly argued before the Circuit Court, the propriety of the exclusion of the statements must be judged solely upon the ground stated by the Trial Examiner and upheld by the Board, that the regulation forbade the disclosures, *U. S.* v. *Andolschek*, 142 F.2d 503, 507.

CONCLUSION.

The decision below raises serious questions as to the proper interrelationship of federal and state authority in the field of labor relations. It is also in conflict with decisions of this Court, the various Circuit Courts of Appeals and the Congress of the United States as to the reinstatement rights of strikers who engage in improper conduct on and off the picket line. It raises important issues as to the requirements of fairness in administrative hearings. Accordingly, we respectfully submit that this Petition for Certiorari should be granted.

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Appendix A.

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. Secs. 151, et. seq.), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: • • •

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, • • • Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts

of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such

person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was

made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

The pertinent provisions of the Board Rules and Regulations, referred to by the trial examiner as section 203.90 and set forth in 29 CFR 102.90, since renumbered 102.87 (17 F. R. 4983) read as follows:

"No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, subpena *duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board, if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpena or subpena *duces tecum* calling for records or testimony as described hereinabove shall have been served upon any such persons or other office or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board, or the general

counsel, as the case may be, appear in answer thereto and respectfully decline by reason of this rule to produce or present such files, documents, reports, memoranda, or records of the Board or give such testimony."

Appendix B.

United States Court of Appeals
For the First Circuit

No. 4728.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

THAYER COMPANY ET AL.,

RESPONDENTS.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[99 NLRB 1122]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Norton J. Come, Attorney, with whom *George J. Bott*, General Counsel, *David P. Findling*, Associate General Counsel, *A. Norman Somers*, Assistant General Counsel, and *Irving M. Herman*, Attorney, were on brief, for petitioner.

Joseph N. Welch and *Samuel M. Salny*, with whom *David Burstein*, *George H. Foley* and *Hale and Dorr* were on brief, for respondents.

OPINION OF THE COURT.

June 3, 1954.

MAGRUDER, *Chief Judge*. The Labor Board, under § 10(e) of the National Labor Relations Act, 61 Stat. 147, 29 U.S.C. § 160(e), has petitioned this court to enforce its order promulgated June 30, 1952, and directed against the Thayer Company and H. N. Thayer Company, both of Gardner, Massachusetts. Respondents are closely affiliated corporations, regarded by the Board as a single employer within the meaning of the Act. The order re-

quires *inter alia* the reinstatement with back pay of 103 of respondents' employees who engaged in a prolonged strike found by the Board to have been precipitated by the companies' unfair labor practice; the disestablishment of unaffiliated labor organizations held to have been supported by the respondents; the payment of a bonus to H. N. Thayer Company employees; and the termination by respondents of conduct deemed violative of §§ 8(a) (1) and 8(a) (3) of the Act.

Respondents challenge the validity of this order on numerous grounds. Their principal objections are: (1) That the findings of fact made by the trial examiner and adopted by the Board are unsupported on the record; (2) that the proceeding before the trial examiner was unfair and prejudicial to the respondents in that their counsel was not permitted during the course of the hearing to obtain the pre-trial statements given to Board investigators by certain witnesses; (3) that a state court decree enjoining the picketing of respondents' premises should have been treated in the Board proceeding as res judicata with respect to the question of reinstatement; and (4) that even on the facts as found by the Board, reinstatement was improper since the strikers were not engaged in concerted activities within the meaning of § 7 of the Act.

In determining the merits of the latter two contentions by respondents, we accept the version of the facts as found by the Board, for we are convinced after a careful reading of the long and often contradictory testimony in this case that those findings are based upon substantial evidence on the record as a whole.

Thus, for our purposes the relevant facts may be taken as the following: On January 10 and 11 of 1949, seventeen employees of the H. N. Thayer Company were discharged because of their membership in and activities on

behalf of Local 154 of the United Furniture Workers of America, CIO. These discharges were the culmination of respondents' long-standing hostility toward the UFW. In 1940 the Thayer Company, or Plant 1 as it is called, sponsored the formation of a Workers' Council to combat an organizational drive by the Furniture Workers. A similar Workers' Council was established in 1945 at Plant 2, so called (H. N. Thayer Company). In the fall of 1948 employee dissatisfaction with the Workers' Councils at both plants, and the possibility of a cut-back in wages, led to new and intensified activity on the part of the CIO union which, on October 26, demanded recognition as the employee bargaining representative. Respondents declined to recognize the UFW. Instead, management, in an attempt to discourage further union gains among its employees, threatened to discharge any of its workers found proselytizing for the CIO and also to close down its plants rather than deal with the union. These tactics proved successful at Plant 1 where a labor agreement was signed with the company-dominated Workers' Council on December 15, 1948.

At the H. N. Thayer Company, or Plant 2, where pro-CIO sentiment was stronger, the management refrained from negotiating a labor agreement for 1949 until after the first of that year, and in an attempt to discourage union activity on the part of its employees it withheld from them the usual Christmas bonus. Subsequently an agreement was negotiated with the company-dominated H. N. Thayer Workers' Council. This contract was circulated among the employees for individual signatures (as had been done at Plant 1) after the aforesaid discharges of January 10 and 11, 1949.

These discharges resulted in a strike by the employees at both factories. The strike commenced at Plant 2 on January 26, and at Plant 1 on January 27. From its inception

it was accompanied by picketing on the part of the workers, who were admonished by their leaders to refrain from interfering with those employees who wished to remain at work.

The picketing was intensive. As many as sixty individuals circled Plant 2 at one time, and at Plant 1 one hundred and sixty marched at arm's-length distance apart. The number of pickets, however, was generally far less than this. The 160 figure included employees from other plants in Gardner sympathetically disposed to the cause of the Thayer workers. During the hours when no employees were leaving or entering the plant, only a handful of pickets patrolled the streets outside the factories. The large concentrations occurred in the early morning when the plants opened and at 4:00 P.M. when they closed.

The picket lines were fairly well-behaved, and non-striking employees were able to enter and leave the plants without serious incident. Police were present throughout the strike, and while it was often necessary for them to step in front of the pickets in order to open up the driveways leading to the plants, these police activities met with only very minor resistance on the part of the pickets.

The companies took the position from the outset that the strike was illegal and that they were privileged to discharge any of the participants. They disclosed their opinion to the strikers by an advertisement in a local newspaper and they sought legal support for their position in the courts. Their first attempt to secure an injunction against the picketing of their plants proved unsuccessful. On March 10, 1949, however, respondents did obtain from a judge of the Superior Court of Worcester County a temporary injunction, which was made permanent on March 15, on the basis of a holding that the strike was for an "illegal purpose" and was carried out by "illegal means". This injunction was ultimately sustained by the Massachu-

setts Supreme Judicial Court on the single ground that the picketing was conducted in an illegal manner, being violent and destructive of property.[1]

The injunction broke up the strike, and on March 15 the pickets commenced reapplying for their jobs. Eighty-six of the 103 employees covered by the Board's reinstatement order were refused reinstatement by the respondents on the ground that they had engaged in the strike and had picketed the plants. The remaining seventeen are the employees discharged on January 10 and 11 because of their union activities.

With this background we turn to the question of what effect the state court injunction had on the propriety of the Board's order reinstating the discharged pickets. It must be remembered that the employees were engaged in a strike provoked by unfair labor practices. This means, of course, that under ordinary circumstances if such strikers apply for their jobs at the termination of the strike, they must be returned to their old positions irrespective of the effect that such reinstatement may have upon the tenure of new employees hired as replacements. See, *e.g.*, *NLRB* v. *Remington Rand, Inc.*, 130 F.2d 919, 927, 928 (C.A. 2d, 1942). Where a strike is not caused by an unfair labor practice but is economic in nature, the employer need not discharge replacements in order to rehire strikers. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); *NLRB* v. *Jackson Press, Inc.*, 201 F.2d 541, 546 (C.A. 7th, 1953). However, even in the situation of an economic strike, to avoid committing an 8(a)(1)[2] unfair labor practice, the employer generally must rehire those strikers whose positions have not been filled and must re-

[1] *Thayer Co.* v. *Binnall*, 326 Mass. 467, 95 N.E. 2d 193 (1950).

[2] 29 U.S.C. § 158(a)(1): "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7".

frain from disciplining them for the concerted activity. *Home Beneficial Life Ins. Co., Inc.* v. *NLRB*, 159 F.2d 280 (C.A. 4th, 1947); *General Electric Co.*, 80 NLRB 174 (1948).

There is an exception to the latter generalization. If an economic strike as conducted is not concerted activity within the protection of § 7,[3] then the employer is free to discharge the participating employees for the strike activity and the Board is powerless to order their reinstatement, see, *e.g.*, *NLRB* v. *Indiana Desk Co.*, 149 F.2d 987 (C.A. 7th, 1945). This is so because, if the particular collective action is not a protected § 7 activity, the employer commits no unfair labor practice by thus terminating the employment relation. He has not interfered with, restrained or coerced employees in the exercise of their rights guaranteed in § 7.[4] See Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319, 320 (1951). Therefore, since the power of the Board to order reinstatement under § 10(c)[5] is dependent upon its finding that an unfair labor

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[3] 29 U.S.C. § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . . "

[4] This is a paraphrase of the language of § 8(a)(1) of the Act. The employer could not be guilty of any of the other four employer unfair labor practices for refusing to reinstate employees because they engaged in a strike. Section 8(a)(2) makes it an unfair practice for an employer "to dominate or interfere with the formation or administration of any labor organization. . . . " Section 8(a)(3) is applicable only where the discrimination is to encourage or discourage membership in any labor organization. Section 8(a)(4) makes it illegal for an employer "to . . . discriminate against an employee because he has filed charges or given testimony under this Act". And Section 8(a)(5) imposes a duty on the employer to bargain collectively.

[5] " . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall . . . cause to be served on such person an order

practice has been committed, and since by hypothesis the economic strike was not caused by an unfair labor practice, it becomes crucial to the question of reinstatement of an economic striker to inquire whether the strike as conducted constituted concerted activity within the protection of § 7.

On the other hand where, as in the instant case, the strike was caused by an unfair labor practice, the power of the Board to order reinstatement is not necessarily dependent upon a determination that the strike activity was a "concerted activity" within the protection of § 7. Even if it was not, the National Labor Relations Board has power under § 10(c) to order reinstatement if the discharges were not "for cause"[6] and if such an order would effectuate the policies of the Act. Of course the discharge of strikers engaged in non-Section 7 activities often may be for cause, or their reinstatement may not effectuate the policies of the Act, but in certain circumstances it may.[7] The point is that where collective action is precipitated by an unfair

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requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . . *provided further* . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . . " 29 U.S.C. § 160(c).

[6] The "for cause" proviso added to § 10(c) in 1947 is applicable where the employee is engaged in collective action as well as where he acts alone, H.R. Rep. No. 510, 80th Cong., 1st Sess., 38-39; and it would seem that where an employee is discharged because he engaged in collective action and the discharge is found to be "for cause", the action is not the type protected under § 7. *NLRB* v. *Local Union No. 1229, Int. Brotherhood of Electrical Workers*, 346 U.S. 464 (1953). However, a determination that an employee is not engaged in a § 7 activity does not necessarily mean that, if he is discharged for his participation in the unprotected action, the discharge is "for cause". That depends on the surrounding circumstances. What is *cause* in one situation may not be in another.

[7] See *NLRB* v. *Elkland Leather Co., Inc.*, 114 F.2d 221 (C.A. 3d, 1940), cert. denied 311 U.S. 705 (1940).

labor practice, a finding that that action is not protected under § 7 does not, *ipso facto*, preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity.[8]

The respondents apparently have not recognized this subtlety, and failure to do so seems to have influenced their reasoning with respect to the effect of the state court decision.

As we understand it, what the respondents really are asking this court to hold is that the Massachusetts decision[9] is conclusive against reinstatement and forever bars the discharged employees from litigating this issue in another forum.

Bearing in mind the respondents' misconception that the Board necessarily has no power to order reinstatement if the striking employees engaged in a non-Section 7 activity, their theory with respect to the state adjudication appears to have two aspects: (1) They contend that the Massachusetts decision holding that the strike was conducted in an illegal manner under state law is the equivalent of a finding that the strike was not a concerted activity protected by § 7 of the Act; and (2) that the state court decision is, therefore, res judicata on the question of reinstatement of the strikers.

Turning to point (1), perhaps we may infer from the *Briggs-Stratton* case[10] that it would be violative of the supremacy clause of the Constitution for a state court to

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[8] This analytical distinction has been overlooked on many occasions. Professor Cox states: "The distinction was overlooked by the House managers in reporting the conference agreement on the Labor Management Relations Act 1947, H.R. Rep. No. 510, 80th Cong., 1st Sess., 38-39 (1947) and unfortunately it has not always been observed by the Board." Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319 at 324, note 24 (1951).

[9] *Thayer Co.* v. *Binnall*, 326 Mass. 467, 95 N.E.2d 193 (1950).

[10] *International Union, UAWA, AFL* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1949). The case held that a state had power to control "recurrent or intermittent unannounced stoppage

enjoin employee activity protected under § 7. If that inference is correct, there is some merit to this aspect of the respondents' argument, for the Supreme Court has held that the States are free, at least to some extent, to regulate the means or methods by which a strike is conducted. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); see *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 488 (1953). Putting *Allen-Bradley* together with *Briggs-Stratton*, it would follow that when a state tribunal enjoins a strike because the strike as conducted constitutes an illegal breach of the peace, the state court's determination is tantamount to a finding that the employees by their conduct have lost the protection of § 7 of the National Labor Relations Act.

Taking up the second aspect of the respondents' theory, it seems perfectly clear that, notwithstanding what has been said above, it is not accurate to say, as respondents do, that the findings of the state court are binding upon the Board under the traditional doctrines of res judicata or collateral estoppel. Such a proposition is invalid even under the respondents' assumption that the pickets in this case may be reinstated only if their conduct was protected under § 7, for the Board was not a party to the state adjudication. Nor is the Board merely a representative of the employees who were involved in the prior litigation. To some extent at least, the Board represents the public interest as defined in the National Labor Relations Act.

Be that as it may, if it were true that the Board has power to order reinstatement only after finding that the

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of work". To reach this result the court found it necessary to decide that the collective action was not concerted activity within the meaning of § 7 of the NLRA. The tone, mood and language of the opinion strongly suggest that, if the work stoppages were protected under § 7, the state action would have been unconstitutional. Cf. *Hill* v. *Florida*, 325 U.S. 538 (1945).

strike and the picketing are protected under § 7, a holding that the Board is bound by the findings in the state injunction proceeding might perhaps be justified (this we do not have to decide), for it might be suggested that the public interest would hardly be benefited by relitigating in the Board proceedings the precise question which was determined in the state tribunal, and which might have been brought before the Supreme Court of the United States for review on certiorari. Giving effect to the state determination, on the other hand, has the possible advantage of allowing the participants to act in reliance upon the earlier decision and might facilitate the re-establishment of labor stability in the disrupted plant. See Developments in the Law---Res Judicata, 65 Harv. L. Rev. 818 at 871 (1952).

This is all well and good if the validity of the reinstatement order depended upon a finding that the picketing was conducted within the ambit of § 7. As we have explained above, such is not the case here because the strike was caused by an nufair labor practice. The actual questions in this case are whether under the circumstances the strike conduct was cause for discharge, and if not whether reinstatement would effectuate the policies of the Act. To resolve these questions, the Board need never decide the spcific question of whether the picketing was concerted activity within the protection of § 7.

Since the crucial discharge-for-cause issue and the issue of whether reinstatement would effectuate the policies of the federal Act were never litigated (indeed could not have been litigated) in the state tribunal, the respondents' suggestions with respect to res judicata and collateral estoppel are quite untenable.[11]

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[11] But cf. *New York State Labor Relations Board* v. *Holland Laundry, Inc.*, 294 N.Y. 480, 63 N.E. 2d 68 (1945), criticized, perhaps too mildly, by Professor Jaffe in his article, The Public Right Dogma in Labor Board Cases, 59 Harv. L. Rev. 720, 743 (1946).

Thus we think that the state court decision did not necessarily preclude a reinstatement order, and we pass to a consideration of whether reinstatement was a proper remedy in view of the Board's own findings of fact.

The Board found that the strike was caused by the discriminatory discharges of January 10 and 11, 1949, but concluded that the strikers were not eligible for reinstatement if their collective action did not come within the scope of § 7 of the Act.[12] We have indicated that this approach is erroneous and have suggested that, if it were not, the respondents' arguments with respect to the Massachusetts decision might have been more favorably received. While the Board's misconception does not affect our reasoning above, it does bring other aspects of this case to us in a different procedural posture from what might have been anticipated.

The Board came to the conclusion that the strike and picketing were protected under § 7, and thereupon ordered reinstatement. That holding with respect to § 7 constitutes a ruling of law based upon statutory construction which we are free to examine without deference to the Board's administrative expertness. Inherent in the Board's order, however, is the implied determination that, if the picketing employees were protected by § 7, their reinstatement would effectuate the policies of the statute;[13] and in respect to such a determination, we would defer to the Board for two reasons: (1) This is a nice question of the

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[12] "Like the Trial Examiner, we find that the strike voted on January 25, and commenced on January 26 and 27, 1949, was an unfair labor practice strike to protest these discriminatory discharges of January 10-11. We further find that the strikers are entitled to reinstatement, unless there is merit to any of the Respondent Companies several contentions relating to the question of whether or not the strike and the strike conduct constituted protected concerted activity." *H. N. Thayer Co.*, 99 NLRB 1122, 1128 (1952).

[13] Of course if the pickets were engaged in § 7 activities, their discharge for such activities cannot be discharge for cause.

appropriateness of the remedy confided primarily to Board determination. (2) It ordinarily may be assumed that the Board, as a part of the process of determining whether reinstatement would effectuate the policies of the Act, will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike. Thus in reaching its decision the Board weighs two groups of facts. Such a decision has little value as a precedent in a subsequent Labor Board case because of the nuances of fact inevitable in the later situation. Therefore, if this court should conclude that the strike activity was not protected conduct under § 7, our disposition should be to remand the case to the Board in order to allow that body to make the primary administrative determination---which it has not yet made---whether under the circumstances the non-Section 7 activity was cause for discharge, and if not whether reinstatement is an appropriate remedy under the circumstances.[14]

In our view, we need not remand the case for this purpose with respect to most of the employees ordered reinstated, for we agree with the Board that generally the conduct of the strikers on the picket line was protected collective action within the meaning of § 7.

If the pickets "restrained" or "coerced" other employees in the exercise of their rights under § 7 of the Act, and if union responsibility therefor could be demonstrated, the picketing would constitute a union unfair labor practice[15] and therefore would not be a protected concerted activity under § 7. Nor would the same conduct by the picketing employees, even though not attributable to the union, be protected.[16]

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[14] Such a determination could be reviewed subsequently in this court.

[15] 29 U.S.C. § 158(b)(1)(A).

[16] "Although section 8(b) regulates only the conduct of labor or-

This gives us a standard for determining what picket line conduct falls outside the protection of § 7. Certainly conduct which is not a union unfair labor practice may still be unprotected.[17] But with respect to the instant case, if there was no "coercion" or "restraint" of non-striking employees, the picketing should be considered a protected activity, for then the collective action would not have been in violation of any other federal statute;[18] nor on the facts found by the Board was the conduct on the picket line in breach of the peace and therefore enjoinable by state law.[19]

Thus our problem is considerably simplified. It is undisputed that those employees who wished to continue working during the strike were able to do so. The Board and the trial examiner both drew the "factual inference" that the pickets did not intend or seek to prevent employees from entering or leaving the plants. There is substantial evidence on the whole record to support this finding. The

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ganizations and section 7 deals with the rights of employees, it seems plain that the group activities which section 8(b) forbids a labor organization to lead must fall outside the protection of section 7 when employees engage in them either with or without the direction of a union. To hold otherwise would disregard legislative history [H.R. Rep. No. 510, 80th Cong., 1st Sess., 37-40 (1947)] and create an unwarranted anomaly." Cox, *op. cit. supra* at 325.

[17] See *Perry Norvell Co.*, 80 NLRB 225, 240 (1948).

[18] See *American News Co., Inc.*, 55 NLRB 1302 (1944); cf. *Southern Steamship Co.*, v. *NLRB*, 316 U.S. 31 (1942).

[19] Mass. Gen. Laws, C. 214 § 9A, as amended, provides that no state court may issue an injunction in a case involving or growing out of a labor dispute except after finding, among other things, "(*e*) That the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection." It is clear on the Board's finding that such protection was afforded the respondents.

There are no other factors in the instant case which should take the strike or picketing outside the protection of § 7. Respondents have argued that the strike was in breach of a valid labor agreement. We agree with the Board that this is not so. Cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 359-61 (1940); *NLRB* v. *Reed & Prince Mfg. Co.*, 118 F.2d 874, 887 (C.A. 1st, 1941), cert. denied 313 U.S. 595 (1941).

aggregate of these two facts compels a conclusion that, except for isolated incidents discussed below, the non-strikers were not restrained or coerced in the exercise of their rights under § 7, and therefore the pickets were engaged in concerted activity protected by § 7.

Certain strikers, however, participated in activities which we find were coercive, and therefore not within the scope of § 7. The trial examiner, in recommending the reinstatement of such strikers, took into consideration the fact that "the strike resulted from the flagrant unfair labor practices of Respondent Companies". This seems perfectly proper—not in justifying the employees' conduct or in concluding that their action was protected under § 7—but in deciding whether or not their discharge was "for cause" and whether their reinstatement would effectuate the policies of the Act.

The Board, as we have noted, made reinstatement turn exclusively on whether the employees' conduct was within § 7. It therefore apparently disregarded, and properly, under its approach, the fact that the strike was touched off by an unfair labor practice.[20]

Since we disagree with the Board on some of these individual incidents, we shall remand where we disagree, with instructions that the Board decide whether under the circumstances there was cause for the respondents' refusal to rehire the particular strikers involved in the non-Section 7 activity, and if not whether reinstatement of these employees would effectuate the policies of the Act.

We hold that the following incidents were coercive in nature and calculated to instill fear of physical harm in the non-striker victims, and are therefore not activities

[20] "In reaching the same conclusion as the Trial Examiner did, we have appraised each incident without regard to the length, nature, physical or psychological setting of the strike." *H. N. Thayer Co.*, 99 NLRB 1122, 1133, note 37 (1952).

protected under § 7: (1) The visit to the home of George Andrews, a non-striker, by 20 or 30 men in five automobiles for the purpose of persuading Andrews to respect the picket line; (2) a similar visit to the home of James Thompson; (3) two visits by three carloads of pickets to the home of Joe Tatro for the purpose of persuading Tatro to join the strike; (4) two visits to the home of Zigmand Maliska by five cars full of strikers, for the purpose of persuading Maliska to respect the picket line; (5) a visit by five strikers at 6:30 A.M. to Theodore Raffa's home to persuade Raffa to join the strike; and (6) an attack upon Cornelius Magner, a non-striker, by 17 or 18 pickets in front of the H. N. Thayer Company.

Respondents have raised several other objections to our enforcing the order of the Board. We have examined these objections closely and find them to be without merit, however, we do deem it necessary to explore a portion of the hearing before the trial examiner.

Edgar Arsenault was one of the general counsel's early witnesses at the hearing. During his cross-examination respondents' counsel, Salny, asked Arsenault:

> "Did you give Mr. Ramsey (attorney for the general counsel) a statement. . . " A. I did.
>
> Q .Signed it? A. I did.
>
> Q. (To Ramsey) May I see the statement. . . ?"

When met with a refusal Salny stated: "I make demand for it on the ground that the statement which was given--- I want to cross-examine this witness to demonstrate that the statement he gave a year ago and his evidence that he gave to-day are not the same."

Ramsey refused to produce the document which had not been used during direct examination for any purpose, stating that there had been no adequate foundation for its production. He subsequently relied upon a Board rule which prohibits disclosure by an attorney of information

in NLRB files except upon authorization of the Board, its chairman, or the general counsel.[21]

Salny argued that under Massachusetts law the statement had to be produced. The trial examiner at Salny's request issued a subpoena duces tecum requiring Ramsey to produce this statement but he subsequently quashed the subpoena on the ground that under the Board's regulation he had no power to require the production of the documents.

Salny indicated that he would seek the consent of the general counsel and in a letter to him dated July 18, 1950, he requested that Ramsey be authorized "to produce said statement, so that I may use same in examination of said Edgar J. Arsenault.[22] As similar questions will undoubtedly

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[21] CFR 102.90, since renumbered 102.87 (17 F.R. 4983):

"No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether the written consent of the Board or the chairman of the Board, if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpena or subpena duces tecum calling for records or testimony as described hereinabove shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board, or the general counsel, as the case may be, appear in answer thereto and respectfully decline by reason of this rule to produce or present such files, documents, reports, memoranda, or records of the Board or give such testimony."

[22] The letter indicated that Salny wished the statement for "the purpose of demonstrating to the Trial Examiner that the evidence which [Arsenault] had given was contradictory to and inconsistent with [his pre-trial statement]".

arise . . . . I also hereby request that the general counsel issue a general authorization to the said . . . Ramsey, authorizing him to produce, and to make available to me, from time to time as occasion may require . . . statements given to any representative of the NLRB by any witnesses who may testify during the course of said hearing."

This request was denied by the general counsel in a letter dated July 20, 1950, which indicated the reason for the denial to be Salny's failure to make "a *prima facie* showing in advance of inspection of the document that the prior statement given by a particular witness is at variance with the testimony he has given on the stand".[23] This exchange of letters appears to have ended the matter as far as the hearing before the trial examiner is concerned. Salny reported the receipt of the general counsel's letter, but did not make any further requests for pre-trial statements.

Some time after the issuance of the trial examiner's reports, however, respondent companies moved to reopen the records and adduce more testimony "requesting the opportunity to cross-examine various witnesses for the asserted purposes of impeachment and contradiction on the basis of the affidavits or statements such witnesses had given to Board agents during the course of investigation and preparation for the trial of this case." Salny in an accompanying affidavit stated that he had not made demands for pre-trial documents of the other witnesses earlier because of the general counsel's letter which rejected his request for authorization.

The Board denied this motion.

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[23] The letter went on to say that the rule is a "two-way street" so that the general counsel's attorney could not obtain statements given to Salny except on a *prima facie* showing that the testimony and the statement were contradictory.

It should be noted that Ramsey did use some pre-trial documents during the course of the hearing, which were always offered to Salny for his inspection.

Respondents argue that they had a right to obtain these statements and that the disregard of this right constitutes prejudicial error, since they did not have an opportunity properly to cross-examine the witnesses of the general counsel whose stories were believed by the trial examiner and the Board.

We do not agree. Disregarding altogether the Board's regulation, the respondents made no showing which would have entitled them to these pre-trial statements. The main thrust of their argument here is that under Massachusetts law they had an unqualified right to examine these documents. We are unable to find any case that so holds. The leading Massachusetts decision on the subject, *Leonard* v. *Taylor*, 315 Mass. 580, 53 N.E.2d 705 (1944), we read as directly contrary to such a proposition.

Furthermore, there is nothing in such cases as *Gordon* v. *United States*, 344 U.S. 414 (1953), or *United States* v. *Krulewitch*, 145 F.2d 76 (C.A. 2d, 1944), to support respondents' position, for counsel for respondents laid no foundation whatever before he demanded the pre-trial statements given by witnesses to the general counsel's investigators. His simple assertion that the statements, which were not employed during the hearing by Mr. Ramsey, were to be used for the purpose of cross-examination, hardly suffices. Cf. *Goldman* v. *United States*, 316 U.S. 129 (1942); *Lennon* v. *United States*, 20 F.2d 490 (C.A. 8th, 1927).

The situation is indistinguishable in any material respect from that presented to the Second Circuit in *NLRB* v. *Quest-shon Mark Brassiere Co., Inc.*, 185 F.2d 285, 289 (1950), and in *NLRB* v. *Jamestown Sterling Corp.*, No. 22,862, April 5, 1954. We dispose of the comparable problem here in the same manner.

The Board will submit for our consideration a draft decree in conformity with the foregoing opinion.